

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 268 of 1996.

Judgement reserved on: 1.11.2007.

Date of decision: 2.11.2007.

Rattan Dass & anr.

..... Appellants.

Vs.

Smt. Kanku Devi

.... Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. Vinay Thakur, Advocate.

For the Respondents : None.

Kuldip Singh, Judge.

The appellants- defendants are in appeal against the judgement and decree dated 17.4.1996 passed by the learned District Judge Kinnaur, Rampur Bushahr in case No. 67-R/13 of 1995/92 reversing the judgement and decree dated 29.8.1992 passed by the learned Sub Judge, Rampur in case No. 73-1 of 1988.

2. The brief facts as emerge from the plaint are that respondent/ plaintiff Smt. Kanku filed a suit claiming herself to be the legally wedded wife of Chandu and Chandu has not executed any will on 7.11.1987 in favour of appellants- defendants. Chandu died on 8.11.1987. In any case, if it is found that such will was executed, then the same is the result of fraud and coercion. Chandu was lying ill at

Whether the reporters of the local papers may be allowed to see the Judgment?

his native village and appellants- defendants forcibly took him to Solan. The appellants- defendants contested the suit by filing written statement. They have taken preliminary objections of locus-standi and maintainability of the suit. On merits, it has been alleged that Chandu was never married with respondent- plaintiff nor she lived with him till his death. Chandu had executed a will dated 7.11.1987 in favour of the appellants- defendants.

3. The learned Sub Judge held that respondent- plaintiff is the widow of deceased Chandu and deceased Chandu had executed a valid will Ex. DA in favour of appellants- defendants and dismissed the suit on 29.8.1992. The respondent- plaintiff filed an appeal, which was allowed by the learned District Judge on 17.4.1996 and decreed the suit, hence this appeal.

4. The appeal has been admitted on following substantial questions of law:-

1. Whether the will in question was legally proved?
2. Whether the respondent has proved her lawful marriage with the deceased, notwithstanding any admissions in the will?

5. An actual date notice was issued by the Registry to the respondent but despite that nobody appeared on behalf of the respondent. I have heard the learned counsel for the appellants and gone through the record. The learned counsel for the appellants has submitted that execution of will Ex. DA dated 7.11.1987, by Chandu in favour of appellants has been proved on record by DW 2 Muni Lal, an attesting witness of the will. The learned District Judge has erred

in rejecting the will Ex. DA. He has submitted that it has not been proved on record that respondent- plaintiff is the widow of Chandu testator.

Substantial question of law Nos. 1 & 2.

6. The substantial questions of law referred above are interconnected and, therefore, they are being taken up together for disposal.

7. The learned Sub Judge while deciding issue No. 4-C, has recorded a specific finding that respondent- plaintiff has claimed herself to be the wife of late Chandu, which fact has not been denied in the cross-examination of respondent- plaintiff and other evidence. The learned Sub Judge has held that respondent –plaintiff is the wife of late Chandu. In the appeal filed by the respondent against the judgement and decree of the trial court, the appellants- defendants did not file any cross objections regarding the finding recorded by the learned Sub Judge on issue No. 4-C that respondent-plaintiff is the widow of late Chandu.

8. Smt. Kanku Devi appeared as PW 1 and has stated that she was married to Chandu 40 years ago at the time of making the statement. PW 2 Anant Ram has stated that Kanku was the wife of Chandu. Kanku and Chandu lived together for 40-45 years. In cross examination, he has stated that his house is at a distance of two furlongs from the house of Chandu. PW 3 Tulsi Ram has also stated that Chandu was the husband of Kanku and they lived together for about 40 yrs. PW 4 Prem Chand, Panchayat Secretary, has proved

Ex. PW 4/A and Ex. PW 4/B from Panchayat record where Kanku has been shown wife of Chandu who died on 8.11.1987.

9. Rattan Dass has appeared as DW 1 and in his statement he has not specifically stated that Kanku was not the wife of Chandu. The witnesses of respondent- plaintiff have categorically proved that she is the widow of Chandu and this is corroborated by Panchayat Record Ex. PW 4/A and Ex. PW 4/B. Chandu and Kanku lived together for about 40 years as husband and wife. In **S.P.S. Balasubramanyam vs. Suruttayan alias Andali Padayachi and others** [AIR 1992 SC 756], it has been held that when a man and a woman lived under same roof and cohabited for a number of years, the law would raise presumption that they lived as husband and wife. The learned Sub Judge has recorded a specific finding that Kanku is the widow of Chandu. The appellants- defendants did not file any cross objections in the appeal filed by respondent- plaintiff in the lower appellate court against the finding recorded by trial court that Kanku is the widow of Chandu. It is thus proved on record that Kanku is the widow of Chandu.

10. The appellants- defendants have examined DW 2 Muni Lal to prove the execution of will Ex. DA dated 7.11.1978. It is admitted case of the parties that Chandu died on 8.11.1987. The respondent-plaintiff in her statement has specifically stated that Chandu was in bad condition and he was not in a position to hear and speak. The will is to be executed as per Section 63 of the Indian Succession Act, 1925 (for short, the Act), which is reproduced as follows:-

“63. Execution of unprivileged Wills:- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

11. DW 2 Muni Lal has stated that will was dictated by an Advocate, which was read over to Chandu. The will Ex. DA was typed by petition writer. Besides Sant Ram, Rattan Dass, Chandu, Advocate, he was present at that time. Chandu admitted the will. They went to Tehsil and before Tehsildar also Chandu admitted the will. Chandu put his thumb mark and Sant Ram had signed. The will

Ex. DA bears his signatures. The perusal of statement of DW 2 would show that it does not prove the execution of will Ex. DA as per Section 63 of the Act. DW 2 has not stated that Chandu put thumb mark on will Ex. DA in his presence as well as in presence of other witness Sant Ram, nor he has stated that he and other witness put signatures on will Ex. DA in presence of Chandu. He has identified only his signatures on will Ex. DA, but not of other attesting witness. According to him, will was dictated by an Advocate and typed by the petition writer, but who instructed the Advocate for writing the will, he has stated nothing, scribe of Ex. DA and second attesting witness of Ex. DA have not been examined.

12. There is nothing on record that Chandu was literate, on the contrary it is the version of DW 2 that will Ex. DA was thumb marked by Chandu. Ex. DA is written in English. DW 2 has not stated that the will was read over and explained to Chandu in vernacular and thereafter, he admitted its correctness at that time as well as before the Tehsildar. Simply because, will is registered, this is not enough to prove the execution of will. It has come on record that Chandu died on 8.11.1987 and alleged will was executed on 7.11.1987. It has been proved on record that Smt. Kanku is the widow of Chandu, but surprisingly no reference of Kanku has been made in Ex. DA and why she has been disinherited by the testator, even though reference of 'wife' has been mentioned in Ex. DA. It is the case of the appellants- defendants that because of ill health of Chandu, he was removed by them for treatment. It is thus clear that at the time of alleged execution of the will, the testator

...7...

was not in a good health. The learned District Judge has rightly appreciated the material on record and has recorded a finding of fact that will Ex. DA is shrouded by a suspicion circumstances. The appellants- defendants were present at the time of execution of alleged will. The appellants- defendants have failed to prove execution of will by Chandu in their favour. No case for interference has been made out by the appellants. The substantial questions of law No. 1 and 2 are decided against the appellants and in favour of the respondent.

13. No other point was urged.

14. The result of the above discussion, the appeal is dismissed. No costs.

November 2, 2007.
(Hem)

(Kuldip Singh)
Judge.